

File S/043/030
M/043/012

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FILED

JUL 10 2007

SECRETARY, BOARD OF
OIL, GAS & MINING

Ronald George, (7721) attorney for Star Stone Quarries, Inc.

**BEFORE THE BOARD OF OIL GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

IN THE MATTER OF THE ADMINISTRATIVE APPEAL
OF APPLICATION DENIAL BY WRIGHT GARFF
RESOURCES, STAR STONE QUARRIES, INC. SUMMIT
COUNTY, UTAH

Docket No. 2007-011
Cause No.
S/043/030,M/43/012.

REPLY TO BRIEF OF WRIGHT/GARFF RESOURCES

Comes now Star Stone Quarries, Inc., through counsel, and as a response to the brief of Wright/Garff submits the following:

SUMMARY OF FACTS AND ISSUES BEFORE THE BOARD

Star Stone has a valid and existing approved large mine plan for the Peoa quarry, which property is now before the board.. Pursuant to this plan Star Stone has been conducting three discreet activities. From 1996 through 2005 Star Stone mined, split, stored and sold building Stone pursuant to a lease with Wright/Garff and other stone brought from outside sources. The lease ended in 2005 and was not renewed by Wright/Garff. At the time building stone was being mined pursuant to the Wright/Garff lease Star Stone was also mining dolomite on the permitted property pursuant to a lease with the BLM. Star Stone continues mining dolomite on the permitted property pursuant to the BLM lease. Since the end of the Wright/Garff lease Star Stone

has continued to split, store and sell building stone on the permitted property that was mined and transported from adjoining property.

Wright/Garff has requested approval of a small mining plan to mine building stone on the property already permitted and currently in use by Star Stone. Star Stone has objected to the approval of Wright/Garff's small mining plan and thus far the department has refused to process Wright/Garff's proposed plan. It is the position of Star Stone that mining of building stone by Wright/Garff or another operator that Wright/Garff may choose to mine the property would interfere with Star Stone's present operations and reclamation of the permitted property..

1.. THE POWER OF THE BOARD IS LIMITED.

Administrative bodies may exercise such powers only as are either expressly or by implication conferred upon it by statute; that is, it has no inherent power such as must frequently be exercised by courts of general jurisdiction *Crain v. W.S. Hatch Co.*, 451 P.2d 788, 22 Utah 2d 280. An administrative agency can only wield powers expressly or implicitly granted to it by statute. *TIG Ins. Co. v. Kauhane*, 101 Hawaii 311, 327, 67 P.3d 810, 826 (App. 2003). However, it is well established that an administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted, *Inc. v. Toledo-Lucas County Bd. of Health*, 773 N.E.2d 536, 545-46 (Ohio 2002) (noting that a statute's grant of power to an administrative agency "may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective"); *Public Util. Comm'n of Texas v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001) ("The basic rule is that a state administrative agency has only those powers that the Legislature expressly confers upon it. But an agency may also have implied powers that are

reasonably necessary to carry out the express responsibilities given to it by the Legislature."). The reason for implied powers is that, "[a]s a practical matter, the [l]egislature [cannot] foresee all the problems incidental to . . . carrying out . . . the duties and responsibilities of the [agency]." See *C.C.T. Equip. Co. v. Hertz Corp.*, 123 S.E.2d 802, 806 (N.C. 1962).

In this matter thus far the department has properly viewed their function and not attempted to take action they are not empowered to take. It certainly is implied in the statutes and rules governing this body that they will not take action to impair vested rights and that it would be unreasonable to attempt to administer two permits for the same area, especially in this case. The board then must protect the permit of Lon Thomas with vested rights and deny the proposed permit of Wright/Garff that would create a situation that would be impossible to administer.

The present proposed action would be analogous to a situation where a board was charged with issuing permits for the use, lets say, of a concert hall. The hypothetical regulations only state that if an applicant meets certain criteria they will be granted a permit to use the hall. In January the board issued a permit for an orchestra to use the hall on July 4, 2007. In June another orchestra requested a permit to perform in the same hall on July 4, 2007, at the same time for which the permit was already issued. Even though the regulations did not address this situation the board would have implied power to deny the second application because it would interfere with a permit already issued and its decision to deny the second application would be appropriate and proper.

2. STAR STONE HAS VESTED RIGHTS.

Vested rights in permits are universally protected. The California Supreme Court has stated the vested rights rule as follows: "It has long been the rule in this state and in other

jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. (*Dobbins v. City of Los Angeles* (1904) 195 U.S. 223 [49 L.Ed. 169, 25 S.Ct. 18]; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal. App. 2d 776, 784 [194 P.2d 148]). In Utah to obtain a vested right in a permit in an analogous zoning situation the court in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980), held that an applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest.

In water law cases an applicant for a permit must make a prima facie showing that the granting of the permit will not impair existing vested water rights. *Provo Water Users Association v. Lambert*, 642 P.2d 1219 (Utah 1982). If the vested right is a significant right it may not be extinguished or abridged by a body lacking judicial power. *Whaler's Village Club v. California Coastal Com.* 173 Cal.App.3d 240. The doctrine is applicable to land use and underwrites a vested right to a particular use of land in special circumstances when the landowner has acted in accordance with established law, or with the permission of the appropriate governmental agencies. *id.* A permit to use land cannot be revoked or altered arbitrarily. *Emmett McLoughlin Realty, Inc. v. Pima County*, 58 P.3d 39, 43 (Ariz.Ct.App.2002).

By granting Lon Thomas a large mining permit he obtained a vested right to continue operations for the life of the mine and reclamation efforts thereafter that cannot be altered or revoked unless he violates the terms of the permit, thereby giving him vested rights. The

suggestion of Mr. Rogers that the department revoke Lon Thomas' permit to allow Wright/ Garff to quarry has no basis in the statutes or regulations governing this department and would offend the principle of vested rights. Only if Wright/Garff could make a prima facie showing that the granting of the Wright/Garff permit would not infringe on the vested rights of Lon Thomas to conduct his present operations and reclamation should a permit be issued to it.

3. GARFF'S MINING PLAN WOULD INTERFERE WITH MINING OF AGGREGATE.

Part of the present mining of Star Stone is dolomite that is extracted on the portion of the permitted property that is leased from the BLM and crushed or will be crushed and stored on the some of the same property that Wright/Garff proposes. Presently Star Stone extracts this consolidated dolomite, crushes, piles and then sells the resulting aggregate from the permitted property. This mining activity predates the application of Wright/Garff and is ongoing. Lon Thomas will testify at the hearing that he requires the same area to crush and store the aggregate that Wright/Garff would intend to use for their proposed mining operation. Star Stone is in full compliance with their present permit and any attempt to revoke or modify the permit is not warranted.

4. GARFF'S MINING PLAN WOULD INTERFERE WITH SPLITTING AND STORING BUILDING STONE BROUGHT FROM ADJOINING PROPERTY.

Although Wright/Garff has argued that splitting, storing and selling stone brought from adjoining property is not mining activity, the department of Oil, Gas and Mining considers it mining activity because the position of the department is that any activity conducted by the permit holder, that disturbs ground within the area included in the mining plan is controlled by the

until he got his permit and that he would see that Lon Thomas was kicked off the site. There is pending litigation between the parties in which Ed Rogers has falsely accused Lon Thomas of stealing stone and Wright/Garff has refused to renew the previous lease for Star Stone to continue to quarry building stone on the property. Even after the lease was terminated with Wright/Garff Ed Rogers has made additional false allegations that Lon Thomas has stolen building stone. Because of extreme animosity between the parties it is not possible that their competing mining operations could coexist on the property.

7. WRIGHT/GARFF COULD HAVE CONTRACTED FOR THE RIGHT TO MINE.

When Wright/Garff leased the property to Star Stone it was known that Star Stone would permit the property and reclaim the property. Wright/Garff could have negotiated a provision in the lease that at the end of the lease, or any extensions of the lease that any approved mining plan would be transferred to Wright/Garff. Wright/Garff did not do this and now wants the department to revoke Star Stone's permit and grant their permit.

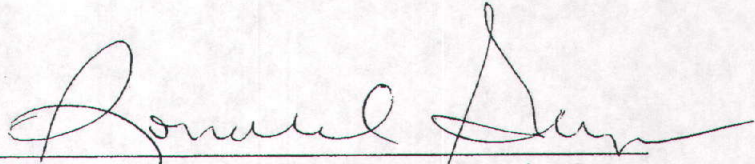
8. ANY ARGUMENT CONCERNING TAKING IS PREMATURE.

This is not the proper forum to argue whether or not the denial of the Wright/ Garff permit would constitute a taking. Any determination of whether or not denial of a permit is a compensable taking requires complex factual assessments of the purposes and economic effects of governmental actions. *Armell v. Salt Lake County Board of Adjustment*, 112 P. 3d 2005. The board must follow the statutes and regulations that govern their actions and any argument of taking must be reserved for a subsequent action in the district court.

9. **CONCLUSION.**

The application of Wright/Garff should be denied because the two operations cannot coexist.

DATED: July 10, 2007.


Ronald George, attorney for Star Stone Quarries, Inc

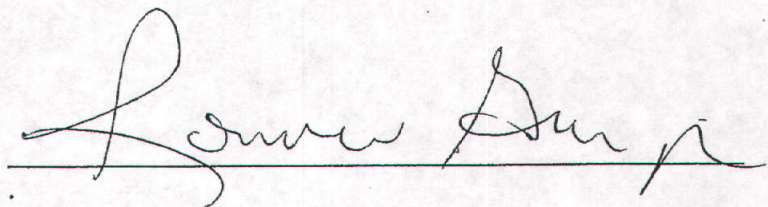
CERTIFICATE OF SERVICE

I certify that on the above date I served the foregoing Response to Wright/Garff's Brief and Star Stone's proposed exhibits, by first class mail, as follows:

Steven A. Wuthrich, Esq.
Attorney for Wright/Garff
1011 Washington Ste. 101
Montpelier, ID 83254

In addition I personally served the following by leaving sufficient copies with the secretary of the Board of Oil Gas and Mining:

Michael S. Johnson
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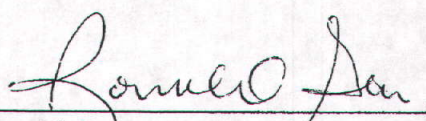
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STAR STONE'S
PROPOSED EXHIBITS

Comes now Star Stone Quarries, Inc., through counsel, and tenders its proposed exhibits,
which are attached hereto.

DATED: July 10, 2007.



Ronald George, attorney for Star Stone Quarries, Inc.

Star Stone Quarries

Exhibit List

<u>Exhibit</u>	<u>Document Title</u>
A.	Mine Plan
B.	BLM Contract
C.	BLM Reports
D.	Summit County Conditional Use Permit 2006
E.	Summit County Temporary Use Permit 2000
F.	Bill of Lading List
G.	Sample of Bill of Ladings
H.	Mine Plan Amendment Request